May 6, 2014

Chairman Jeb Hensarling
Ranking Member Maxine Waters
United States House of Representatives
Committee on Financial Services

Re: Section 5 of the Startup Capital Modernization Act of 2014

Dear Chairman Hensarling and Ranking Member Waters:

I am writing today to express SecondMarket Holding, Inc.'s support for the Private Placement Improvement Act, introduced by Representative Scott Garrett. SecondMarket was founded in New York City in late 2004. SecondMarket is a registered broker dealer and the leading provider of services to facilitate transactions in private company stock. We have also advocated for regulatory change to help private companies raise capital and facilitate job creation --including changes to the 500 shareholder threshold and the elimination of the ban on general solicitation and advertising included in the JOBS Act.

We have been monitoring the progress of the SEC's proposed amendments to Form D and Regulation D with significant concern and strongly believe that many of the SEC's proposed changes are unworkable for startups raising capital in today's electronic world. Consider the reality of how most startup businesses actually raise capital. Early and mid-stage startup private companies are under constant pressure to raise capital in order to grow and expand their businesses. Capital is generally sought by the company's CEO on a continuous basis. The company seldom prepares a formal private placement memorandum, but, instead, uses an investor deck as a tool to explain the company to potential investors. SecondMarket works with many of these early and mid-stage startups, providing transaction management services such as potential investor onboarding, accreditation verification, data room entry, electronic document execution and fund transfer. As a general rule, these transactions do not follow the traditional "investment bank supported" capital raising model more suited to the proposed amendments.

The SEC's proposed rules would require that an "Advance Form D" be filed by the issuer with the SEC no later than 15 days before the commencement of general solicitation. Under current rules, issuers must file a Form D within 15 days following the commencement of an offering. Requiring a filing in advance of an offering will effectively impose a 15-day cooling off period for offerings by startups seeking capital on a continuous basis and is quite simply inconsistent with the intent of the original JOBS Act.

Many startups will be unaware of the legal technicalities and may unintentionally run afoul of the proposed rules. The continuous offerings of startup businesses often lack a clear

"commencement date" that can be relied upon to mark the start of the proposed 15-day filing period. This creates confusion for issuers trying to determine when the Advance Form D filing requirement would be triggered.

The Advance Form D filing requirement also has significant implications for state law compliance. While the SEC's rules require that current Form D be filed with the SEC, state laws also require that the Form D be filed in every state where securities have been sold. Satisfying the current state notice filing requirement already exposes issuers and broker-dealers to a myriad of differing filing requirements and varied state filing fees due to the current lack of uniformity in the Form D filing process across the states. Adoption of the Advance Form D requirements could trigger states to amend their rules to also require issuers to file the Advance Form D in every state where an issuer might sell securities. This would make compliance with the proposed amendment even more unworkable, costly and burdensome for issuers.

The proposed amendment to Rule 507 to disqualify an issuer who failed to comply with the Form D filing requirements within the past five years from relying on Rule 506 for any new offering for a one year period is clearly contrary to the intent of the JOBS Act and punitively disproportionate to the impact that such failure would have on investors and the market. There is absolutely no basis for an amendment that would penalize an issuer for the failure to properly file the Form D by imposing a one-year ban from reliance on the exemption for future offerings.

Such a ban would serve as a death knell for many startups and other issuers that inadvertently fail to comply with highly technical legal filing requirements due to a lack of sophistication or lack of access to legal counsel. Investors participating in a Rule 506 offering will be accredited investors and will have access to all of the information that they consider necessary to make an investment decision. Investors will surely suffer no harm if the issuer fails to properly file a Form D (or possibly multiple variations of Form D). The SEC rightly noted in its proposing release that not every issuer chooses to file a Form D under the current rules, a fact that does not reflect a pattern of problematic practices around Rule 506 offerings under the current rules. Section 1(2) of the proposed legislation will eliminate this overly burdensome penalty.

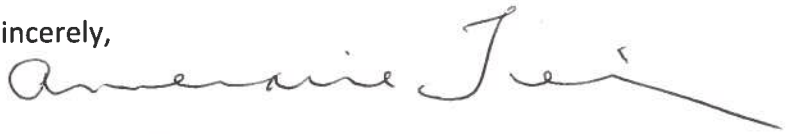
Rule 510T of Regulation D would require that an issuer conducting a 506(c) offering submit to the SEC general solicitation materials prepared and used in connection with the offering in advance of the use of such materials. This would impose a significant expense and burden on issuers. As I mentioned previously, many issuers that will utilize Rule 506(c) are startups in need of constant capital infusions. The lack of a clear commencement date for the offering will cause confusion for compliance with this proposed rule. Many private companies raising capital are run by individuals who have no knowledge of the securities laws and lack the resources to retain capable external counsel on an ongoing basis. Thus, these companies will try to navigate complicated obligations on their own.

The absence of a definition of "written general solicitation materials" will cause widespread confusion and noncompliance. Startups seeking capital will likely utilize social media as a means to solicit investor interest, a communication format that does not allow for long and complicated legal legends. Notwithstanding that it is difficult to know which communications would be subject to the disclosure requirement, many private issuers will be intimidated by an obligation to provide every written communication used in investor communications in the context of a Rule 506(c) offering to the SEC. As a matter of clarification, in no case should these materials be made available to the public via the SEC submission process should the proposed rule be adopted. There is no conceivable public interest that would be served by such disclosure and it would significantly deter reliance on Rule 506(c).

As a result, of all of the Commission's proposed changes to Regulation D, proposed Rule 510T would likely prove the greatest deterrent to an issuer considering whether to raise capital under Rule 506(c). Accordingly, I support Section (6) to require the submission of materials in a single filing after the closing of an offering but would also request that the SEC be directed to provide workable, rational guidance on what types of materials would be considered "general solicitation materials."

Thank you for allowing me to express our support for a very important piece of legislation. Please feel free to contact me with any questions by phone at (212) 668-6671 or email at atierney@secondmarket.com.

Sincerely,



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